IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAMIAN DEVONN WHITELOW, Appellant.	)	2 CA-CR 2006-0286 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20050018

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Julie A. Done — Phoenix
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Sarah Molzow and John F. Palumbo — Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Damian Whitelow was convicted of possessing a deadly weapon as a prohibited possessor. The trial court sentenced him to a presumptive,

enhanced prison term of 4.5 years. On appeal, he argues the trial court erred in precluding evidence supporting his duress defense.[1] Finding no reversible error, we affirm.

Background

¶2 We view the evidence in the light most favorable to sustaining the verdict, resolving all reasonable inferences against Whitelow. *See State v. George*, 206 Ariz. 436, ¶ 3, 79 P.3d 1050, 1054 (App. 2003). In late 2004, Whitelow was a passenger in a car driven by Devin F. when it collided with another car. Devin, who had a warrant out for his arrest, told police officers who arrived to investigate the accident that his name was "LJ Denham." At some point after the officers arrived, Whitelow walked away.

¶3 Nearby, other police officers on bicycles saw Whitelow and asked if he would stop and talk to them. He agreed and, when an officer asked if he had "anything on him that [the officer] should know about," admitted he had a gun and knew he was not supposed to have it because he was on probation. In a tape-recorded statement, Whitelow told the officers that a friend named "LJ" had given him the gun.

¶4 At trial, Whitelow's defense was duress. He claimed Devin had shoved the gun into Whitelow's pants after pointing it at him and threatening to shoot him unless he took it. The trial court instructed the jury on duress, but the jury found Whitelow guilty.

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[1]In his opening brief, Whitelow also argues the trial court erred by failing to instruct the jury on the defense of necessity. But, in his reply brief, he concedes that he forfeited appellate review of all but fundamental error and that any error was neither fundamental nor prejudicial because he did not argue the necessity defense at trial. In light of Whitelow's abandonment of this argument, we do not address it.

Evidence Supporting Duress Defense

¶5 Whitelow argues the trial court erred by precluding the following evidence he contends supported his duress defense: (1) the type and seriousness of the charges facing Devin at the time of the collision; (2) an incident in which Devin had allegedly threatened Whitelow's girlfriend more than a year after Whitelow's arrest and several months before trial in this case; and (3) a prior statement of a witness, Tim C., to the effect that Devin had told Tim he had given his gun to Whitelow on the day of the collision. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 15, 120 P.3d 690, 693 (App. 2005). Error in excluding evidence is not reversible if we can conclude beyond a reasonable doubt that the error did not affect the verdict. *State v. Jeffrey*, 203 Ariz. 111, ¶ 15, 50 P.3d 861, 865 (App. 2002).

¶6 Whitelow claims evidence of the type and seriousness of the outstanding charges against Devin was admissible to show Devin's motive to force Whitelow to take the gun and Whitelow's state of mind at the time. He contends evidence of the alleged threat was admissible to show Devin's "usual course of action . . . to act in his own self interest and threaten others in order to avoid trouble" and to rebut Devin's testimony about how he had heard about the charges brought against Whitelow. Finally, he argues Tim's alleged prior statement was admissible to show that the gun was Devin's and to impeach Devin's and Tim's trial testimony to the contrary.

¶7 To establish duress, Whitelow was required to show that a reasonable person would believe he had been compelled to possess the gun "by the threat or use of immediate physical force against his person . . . which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted." A.R.S. § 13-412(A). Duress must be "present, imminent, and impending." *State v. Jones*, 119 Ariz. 555, 558, 582 P.2d 645, 648 (App. 1978). Our supreme court has found the capital mitigating circumstance of "unusual and substantial duress," A.R.S. § 13-703(G)(2), was not proven in a case in which the defendant disarmed the victim before murdering her. *State v. Williams*, 183 Ariz. 368, 372, 384-85, 904 P.2d 437, 441, 453-54 (1995). The court recognized that disarming the victim ended "any chance of 'unusual and substantial duress.'" *Id.* at 384, 904 P.2d at 453.

¶8 Here, even accepting Whitelow's testimony as true, Devin had been disarmed by the act of giving his gun to Whitelow, and police officers had arrived to investigate the collision before Whitelow walked away and was later confronted by other officers. Any threat or possibility that Devin would use physical force against him had ended. And, by continuing to possess the gun, he was still committing the crime for which he was charged, *see* A.R.S. § 13-3102(A)(4), in the absence of the "'immediate' coercion . . . required by the [duress] statute." *State v. Walker*, 185 Ariz. 228, 240, 914 P.2d 1320, 1332 (App. 1995). Accordingly, the exclusion of evidence offered to show Whitelow had been under duress

before Devin was disarmed and the police arrived could not have affected the verdict. Therefore, even if the trial court erred by precluding the evidence, any error was harmless.

Conclusion

¶9 For the foregoing reasons, we affirm Whitelow's conviction and sentence.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge